Supreme Court, U.S.
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No. 03-760

In The
SUPREME COURT OF THE UNITED STATES

CLIFFORD JOHNSON, Petitioner

v.

CALIFORNIA COURT OF APPEAL, SIXTH APPELLATE DISTRICT; THE BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY, Respondents

Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Clifford Johnson
P. O. Box 1128
Gualala, CA 95445-1128
Tel: (707) 884-4066

Petitioner pro se.

70 pp

QUESTION PRESENTED FOR REVIEW

Does a Miranda-like federal rule preclude the judicial recognition of confidentiality agreements that fail to explicitly except all and any *regulatory* speech?

("Miranda question")

Subsumed question:

If a final state court order enforces a confidentiality agreement that operates to deter a communication of possible interest to federal regulators, may a party to that agreement utilize a federal § 1983 action to obtain a declaration that the order is void as against public policy, so as to risklessly remedy the impairment of rights granted *either*:

(a) under the First Amendment's freedom of speech, freedom of the press, and/or right to petition clauses; *or*

(b) implicitly, by virtue of concomitant impairment of presumed or particular overriding federal jurisdictions; *or*

(c) under the False Claims Act, to meet a bounty hunter suit's disclosure prerequisites (31 U.S.C. § 3730(b)).

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I. JURISDICTION

Under 28 U.S.C. § 1254(1), petitioner Johnson seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed June 19, 2003 (No. 02-17122). App.3, pp. 40-41. A petition for panel rehearing and petition for rehearing en banc was denied by order filed August 21, 2003. App.4, pp. 42-43. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rules, Rule 13.3.

II. CONSTITUTION AND STATUTES

U.S. Const., Art. IV § 4 (Guaranty Clause): "The United States shall guarantee to every state in this Union a republican form of government."

U.S. Const., Art. VI, 2 (Supremacy Clause): "This Constitution, and the laws of the United States which shall be made in pursuance thereof...shall be the supreme law of the land; and the judges in every state shall be bound thereby."

U.S. Const., Amnd. 1 (freedom of speech/press; right to petition): "Congress shall make no law...abridging the freedom of speech, or of the press; or of the right of the people peaceably to...petition the government for a redress of grievances."

U.S. Const., Amnd. 11 (state immunity): "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state."

U.S. Const., Amnd. 14: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

28 U.S.C. § 1738 (Full Faith and Credit Act): "The records and judicial proceedings of any court of any such State…shall have the same full faith and credit in every court within the United States…as they have by law or usage in the courts of such State."

28 U.S.C. § 2201 (Declaratory Judgments Act): "In a case of actual controversy within its jurisdiction…any court of the United States…may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

29 U.S.C. § 626(f) (employer settlement practices): *see* App. 7, pp.52-53.

31 U.S.C. § 3729 et seq. (False Claims Act "FCA"): *see* App. 9, pp. 57-59.

42 U.S.C. § 1983 (Civil Rights Act): "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State… causes to be subjected, any citizen of the United States…to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

42 U.S.C. § 2000e-6 (Equal Opportunity In Employment Act): *see* App. 10, p. 60.

III. STATEMENT OF THE CASE

A. Foreword

This federal action attacks an order of a state court of last resort. A petition seeking direct review of that order was denied by order filed March 23, 2001. No. 01-625. Johnson suggests that this court take judicial notice of that record.

Petitioner regrets his handicapped solo development of issues. Given the scope of the Miranda question, and the extraordinary claim that the record sustains it, he deems it prudent to state the case at length, and include large blocks of the record, despite the general disfavor.

Section H ("judicial prejudice"), in large part details Johnson's petition for rehearing, which did not develop the record on the legal merits. It does contain argument relevant to the grant of certiorari, especially in showing that the court having the obligation to decide this case, was so confronted. The point later made, in support of certifying the Miranda question, is that there was *not* a departure from any accepted and usual judicial course.

B. The Complaint For Declaratory Relief

The disallowed Second Amended Complaint For Declaratory Relief[1] ("complaint"; App. 6, pp. 47-51) states a § 1983 claim against the state judicial defendant. It asks the district court to declare an April 20, 2001 final state court order void as against public policy, because, without the government being informed, it enforces "confidentiality" and "FCA waiver" settlement terms (re a wrongful termination suit) that prevent and deter Johnson from exercising unwaivable rights under the First Amendment and False Claims Act, to communicate with federal regulators, and to file long-threatened multimillion dollar "bounty hunter" and "whistleblower" federal actions, respectively under 31 U.S.C.

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[1] This complaint is at issue and preferred, as in the lower courts. Johnson 's opposition to the motions to dismiss began:

> Plaintiff proposes responsive amendments that complete and clarify the sources of jurisdiction, by expressly citing 28 U.S.C. § 1343(a)(3), (4); by completing the confidentiality term and separately stating confidentiality and FCA waiver matters throughout; by rewriting paragraph 11 ("Jurisdiction: Full Faith And Credit Act Conformity"), to particularly and precisely state and align the facts and law; and by differentiating the university's role as real party in interest.

Johnson argued the proposed complaint, "request[ing] leave to file it in any case, because it is substantially clearer." Leave to amend was denied, the court finding that "it is absolutely clear that the deficiencies of the complaint [can]not be cured." App. 1, p.34-35.

§ 3730(b), (h), against "real defendant in interest," Stanford University ("university"). The prevented and deterred FCA actions are alleged so as to meet only the "arguable future claim" pleading standard.[2]

As alleged, the state court order held the FCA waiver term not against public policy because "if a claim was not waivable, this settlement term would not result in waiver of that claim."[3] As alleged, it also held that:

> (1) the confidentiality term unambiguously included federal regulatory speech, by the broad language that remained even after the deletion, at Johnson's insistence, of language that had explicitly included them; and

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[2] Citing *Steffel v. Thompson*, 415 U.S. 452 (1974) and *Christopher v. Harbury*, 122 S.Ct. 2179, 2187 (2002), Johnson's opposition to dismissal introduced details re the FCA claims, in case the court might require more to meet the arguable future claim standard. He particularly specified violations of 10 U.S.C. §§ 2306a, 2324(c)(3)(A), and of 48 C.F.R. ch.1 pt. 31.3, estimating that the "unauthorized redistributions [included] both a disallowed seven-figure lump sum, and an ongoing diversion of funds seemingly in excess of five million dollars annually, subject to double payback." He also proffered violations re misreported employee functions, and re direct government mandates. These details were elaborated in the prior petition, at 2-4.

[3] App.5, p.50 The FCA waiver issue is largely subsumed under the confidentiality term herein.

> (2) the restriction on regulatory speech was not against public policy because it was "narrowly tailored so as to seal only the terms of the settlement." App.4, pp.42-43.

This tailoring reduced settlement secrets to: (a) the sum that Johnson would receive; (b) the form of an expression of regret that the university would issue, without admitting fault; and (c) the sum that Johnson would forfeit for any violation of the confidentiality clause.[4]

The complaint expressly accepts the finding as to the confidentiality term, attacking only the public policy holding. In particular, it alleges that the confidentiality and waiver terms are inextricably intertwined, and that the tailoring fails to cure the impairment of Johnson's rights and federal jurisdictions, as follows:

> 31 U.S.C. § 3730 (b)(2) mandates that a bounty hunter suit commence with voluntary service on the government of "substantially all the material evidence and information the [relator] possesses." The settlement sum is, in plaintiff's reasonable opinion, an obviously and substantially material fact.[5] Wherefore, said

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[4] A permanent rehire bar was also deemed confidential, until Johnson discovered that it had already been published.

[5] Settlement sums are obviously relevant in related actions, in assessing the credibility of a party, as a witness. *See In Re CFS-*

> confidentiality term prevented and prevents plaintiff from filing a prospective bounty hunter action against the university, potentially to recover millions of federal government dollars.

The exhaustion of other remedies is alleged, culminating in this court's denying certiorari by order filed March 18, 2002.

C. The Jurisdictional Argument And Disposition (In Conflict With Aberrant Holdings That FCA Bounty Hunter Jurisdiction Is Not Exclusively Federal).

Each respondent moved to dismiss for lack of jurisdiction, on the upheld grounds noted below.[6] Johnson's opposition argued the complaint's jurisdictional allegations. It affirmed the usual jurisdiction to decide § 1983 *declaratory* suits per *Ex Parte Young*, *infra*, and specified the applicable Full Faith and Credit Act exception, as follows:

> **5. Jurisdiction.** Pursuant to the jurisdictional grants of 28 U.S.C. § 1343(a) (3), (4), this action is brought under 42 U.S.C. § 1983, as it applies to states through the Fourteenth Amendment, to remedy the continuing invasion

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Related Securities Fraud Litigation (N.D. Okla., Nos. 99-CV-825-K(J), Jul. 31, 2003). This applies to Johnson's credibility.

[6] The university also attacked the FCA claims as insufficient, and mooted by a six year limitations. Johnson responded with further particulars and by affirming a ten year limit, belatedly accrued from an unknown day in 1998, when a false record was created, to cover up the earlier violations. See pp. 5 n.2, 57-59. The dismissal was without prejudice to the FCA claims.

of plaintiff's federal rights by the below-alleged judicial order, issued effective April 20, 2001.

11. Jurisdiction: Full Faith And Credit Act Conformity. ...Under *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367 (1996), jurisdiction to enjoin the confidentiality term and FCA waiver terms is established by the alleged facts that they were agreed to without the government's knowledge or consent, and that each deters the initiation of bounty hunter claims under the FCA. Under *U.S. ex rel. Green v. Northrop Corp.*, 59 F.3d 953 (9th Cir.1995), such settlement terms are in irreconcilable conflict with the FCA, wherefore the *Matsushita* standard is met.

Johnson's opposition, new trial, and appellate arguments showed that not one of either respondents' or of either courts' Eleventh Amendment immunity (or other) authorities had ever dismissed a § 1983 suit for declaratory relief, and that most of them instead noted the availability of such suits under *Ex Parte Young*. Johnson also provided a line of authorities allowing such suits against state courts, judges, and justices, culminating in *Matsushita's* precise standard for reviewing state-court-entered settlement terms that impair exclusively federal jurisdictions.[7]

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[7] In the district court only, Johnson also argued that the state's res judicata law did not apply. The following was an alleged distinction:

Underpinning this further analysis was the point federal courts have exclusive jurisdiction over FCA bounty hunter claims, *albeit contrary to the only three on-point authorities found*, namely: *United States ex rel. Hartigan v. Palumbo Bros., Inc.*, 797 F.Supp. 624 (N.D.Ill. 1992); *U.S. ex rel. Paul v. PBQ&D*, 860 F. Supp. 370, 374-375 (S.D.Tex. 1994); aff'd without opinion 53 F.3d 1282 (5th Cir.1995); *U.S. ex rel Mayfield v. Lockheed Martin Eng. & Sciences,* 186 F.Supp.2d 711, 714 (S.D.Tex. 2002). Johnson debunked these cases as plainly aberrant. *Hartigan,* from which the later cases derived, failed to notice the drastic 1986 upgrade to the FCA's qui tam provisions.[8]

To such exclusive federal jurisdiction, the protections of state jurisdiction afforded by the Anti-Injunction Act and *Rooker-Feldman* doctrine do not apply. The *Matsushita-Miranda* analysis is presented in subsequent points.

The August 26, 2002, district court transcript shows that, in finding no § 1983 claim before it, the court did not decide exclusive jurisdiction, or anything else, about the deterred FCA claims:

> The confidentiality term was affirmed [by the state court] in substantial part on the ground that "there is no indication anywhere in the record before us that anyone other than plaintiff ever expressed any interest in these proceedings," whereas the record now reflects that the United States Supreme Court expressed an interest the proceedings by particularly requesting that the university file a reply to plaintiff's petition for a writ of certiorari.

[8] Johnson does not contest holdings of concurrent jurisdiction over FCA *whistleblower* suits, for *damages*.

> MR. JOHNSON: The second point with regard to the Rooker-Feldman, is I believe the FCA, the False Claims Act claims I'm talking about, have exclusive federal jurisdiction.
>
> THE COURT: Well, that's why I'm making the distinction I am. Those claims aren't in the case right now and I'm not in a position to comment as to whether those claims are viable, whether they would cause a breach of the settlement, or anything else.

The district court granted both motions to dismiss by the order at App. 1 pp.32-37, filed August 28, 2002, expressly without prejudice to the prospective FCA claims, on the grounds that: (i) no actionable invasion of federal rights is alleged, under § 1983; (ii) abstention is required under the *Rooker-Feldman* doctrine; and (iii) the state is immune from the suit, under the Eleventh Amendment. By the order at App.2, pp.38-39, filed September 27, 2002, the trial court denied a new trial, but clarified its grounds for dismissal, ultimately relying upon the Eleventh Amendment, as follows:

> Although the Court did not address Plaintiff's alleged free speech violations specifically, the Court did make clear that any § 1983 claims against the Sixth District appear to be barred under the Eleventh Amendment.

Conceding that state res judicata law would preclude this suit,[9] Johnson's brief on appeal argued jurisdiction only under *Matsushita*. It further showed that this standard is herein logically identical to the declaratory relief sought by the complaint; wherefore the merits are reached.

By the Memorandum at App.3, 40-41, filed June 19, 2003, the court of appeals affirmed dismissal of the § 1983 complaint against the state defendant, *in full* as follows:

> The district court properly dismissed Johnson's claim against the California Court of Appeal as precluded by the Eleventh Amendment. *See Simmons v. Sacramento County Superior Court*, 318 F.3d 1156, 1161.

Johnson moved for a rehearing and for a rehearing en banc. This was denied by the order at App.4, 42-43.

D. Johnson's *Matsushita-Miranda* Developments

Johnson's *Matsushita* analysis developed in the course of the proceedings.[10] In opposing dismissal, it amounted to three elements:

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[9] However, no bar arises from prejudicial performance. This suit respects the settlement terms, and Johnson not yet received any settlement benefits.

[10] Respondents' post-dismissal papers added nothing to their district court arguments, and so are not further discussed.

(1) federal courts have exclusive jurisdiction over FCA "bounty hunter" claims, an apparently new and conflicted law, discussed above;

(2) both of the settlement terms impaired this jurisdiction, in light of the FCA's full disclosure prerequisite; and

(3) the holding in *U.S. ex rel. Green v. Northrop Corp.*, 59 F.3d 953 (9th Cir.1995) precisely meets *Matsushita's* "irreconcilable conflict" standard, re this jurisdiction.

In moving for new trial, Johnson stressed that his argument re the confidentiality term was stronger, because it impliedly impaired exclusive federal jurisdictions under other statutory schemes, by chilling core free speech rights, of a sort essential to every arm of government.

Johnson's appeal added that the confidentiality term impaired *government*-initiated (besides bounty hunter) suits under the FCA; and that *injunctive* "whistleblower" suits (he had threatened one to void the rehire bar) should be subject to the same exclusivity analysis as bounty hunter suits.

In his brief on appeal, Johnson added the point that: "The Confidentiality Term Impermissibly Impairs Exclusive Federal Jurisdiction Over Suits Brought By The EEOC." This further showed that the state's "narrowly tailored" holding ran foul of *Matsushita*, thus (footnotes in orig.):

"Narrowly tailored so as to seal only settlement terms" is an oxymoron at law. On its face, such

secrecy impairs at least litigation re settlement practices. Illicit settlement terms are actionable by exclusively federal suits, filed by the EEOC, under 42 U.S.C. § 2000e-6.[11] See *Massachusetts v. Bull HN Info. Systems*, 16 F. Supp.2d 90 (Mass. 1998) (violation of settlement standards set by 29 U.S.C. § 626(f), actionable per se).[12]

EEOC v. Astra USA, Inc. 94 F.3d 738, 742 (1st Cir. 1996), addressed settlements that barred talking to the EEOC, as well as filing claims with the EEOC. Noting the EEOC's subpoena powers, *Astra* held the non-filing agreements against public policy, *if executed without EEOC consent*, owing to the vital informative "role that the [initial] filing of a charge plays in the statutory scheme." *Id.* 746. It also held the confidentiality term void, because it would frustrate the purpose of "vindicat[ing] the public interest in preventing employment discrimination," through suits filed *by the EEOC. Id.* 744.

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[11] Under the statute, some suits demand complex federal three-judge proceedings, appointed by rules mixing delimited circuit and district judges...[App.10, p.60-61.]

[12] EEOC as plaintiff affirmed at 102. The primary concern was that former employees could not "risk devastating penalties," which so deterred suits as to "functionally insulate" the illicit waivers. *Id.* 106. The waiver statute was upheld in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998).

> This is the overriding statutory purpose that meets *Matsushita's* jurisdictional standard.
>
> *Astra* ruled out tailoring. Having explained that "any agreement that materially interferes with communication between an employee and the Commission sows the seeds of harm to the public interest," it affirmed an injunction against "enforcing *any* contractual provisions that impede settling employees from assisting the EEOC," and noted that this would apply to sub-covenants not to disclose settlement terms. *Id.* 744, 745 n.6; *emphasis in orig.*[13]

Johnson's *Matsushita* briefings ultimately put the Miranda question above all. This is shown by the following three points, which replicate the record. Notably, Johnson's reply brief referred to an extrinsic protective order (now moot) he was then contesting on the same ground, wherefore he preferred the remedy of a published "Miranda" rule.

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[13] The EEOC might well have been interested in terms herein, which also settled sex and age discrimination disputes. Illicit anti-government assist terms were standard in 1998 [at the university], before an EEOC investigation in about 1999. If the EEOC did not know of them, these recent terms would have been of great interest. Attempts to coerce a return of all [Johnson's] copies, and later suppressions, are on record. [Record cited.] The EEOC investigation period could be noticed, but the *possible* interest seems shown [already].

E. [Reproduced Appeal Brief] A State Court Cannot Unilaterally Penalize *Any* Proper Federal Regulatory Communications, Owing To...The Government's Unwaivable And Coextensive Right To Know.

[T]he state court legitimated the confidentiality term as "narrowly tailored so as to seal only the terms of the settlement." But it is not for state judges, let alone at the behest of smug settlors, let alone tempted to clear dockets, to second guess the current concerns and devious investigations of unnoticed federal regulators, so sealing injured lips.

Any state court order that promises to penalize *any* communication of possible interest to *any* federal regulator(s), implicitly impairs the capacity of the possibly interested regulator(s) to discover facts on or by which the United States might *directly* bring suit, under numerous statutes. Federal courts generally have exclusive jurisdiction over regulatory enforcement suits brought by the United States, and the public interest in them presumptively trumps the irreconcilably conflicting interest in settlements. See *Digital Equipment Corp. v. Desktop Direct* 511 U.S. 863, 878-880 (1994) ("public policy favoring the voluntary resolution of disputes" clearly outweighed by "rights originating in the Constitution or statutes";[14] outrage that statute-based "public policy may be trumped routinely by the

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[14] In this weighing, the parties' interests count for nothing, or less. "Employers cannot be said to have a legitimate interest in silencing reports of [] potential illegality." *Hufford v. McEnaney*, 249 F.3d 1142, 1149 (9th Cir.2001).

expectations or drafting of clever parties"). The [state court's] conclusory "narrowly tailored" and "unwaived if unwaivable" legitimations herein exemplify such extraculpatory drafting, which is generically nailed by the "operates to deter" standard posited in the declaratory relief.

Across the board, this logic repudiates settlement orders that would keep from the government any information of possible regulatory concern. Short of excluding *all* such communications, no state "tailoring" can render such orders unvoidable, nor are government subpoena powers sufficient mitigation.

[T]wo implicitly impaired jurisdictions [i.e. the FCA and EEOC jurisdictions] particularly show the voidability of the confidentiality term. In addition, they substantiate the overarching point, that any extrinsic restraint on regulatory communications so offends and diminishes the capacity of the United States to act and sue pursuant to the will of Congress, as to imply an Anti-Injunction Act exception, through inviolate First Amendment protections. It is a necessary right of government to *receive* all information of regulatory concern. The necessarily co-extensive *government's* right to know, no individual can waive. To allow exception keeps open a door to dark and slippery slopes, at public peril.

F. [Reproduced Appeal Brief] Confidentiality Agreements That Do Not Explicitly Exclude Federal Regulatory Communications Are Against Overriding Federal Public Policy.

More directly, the confidentiality term is against public policy, simply because it does not explicitly exclude federal regulatory communications. The state court found general language, without such an explicit exclusion, enough to show their unambiguous inclusion. See, e.g. [App.5, p.44[15]] re "***all***." To declare their inclusion against public policy means that regular confidentiality agreements, which routinely involve matters of possible regulatory relevance, are routinely against public policy. A published rule is warranted, to fix elastic reinterpretations that functionally immunize prevalent abuse.

This court could take judicial notice of the fact that this state's corporations and legislature take for granted at least the de facto legality of literally global confidentially pacts, even where death or serious injury has been caused by product defects or environmental hazards.[16] Yet a couple of state cases would seem to have outlawed *more* than such

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[15] The state court added both the boldface and italics.

[16] Whittled down over two years to ban secrecy only in these extreme circumstances, state bills SB 11 and AB 36 were shelved September, 2001. One related federal bill [was] pending, limited to interstate class settlements. H.R. 2341.

worst-case confidentiality pacts.[17] How, then, could a statute that would more narrowly declare such pacts illegal, be long fought, and lose? How avoid the conclusion, that this public policy is trumped routinely?[18]

The routine reaping of illicit benefits through generally worded adhesive waivers and nondisclosure pacts, can only be encouraged by courts that routinely welcome them to clear dockets, and restrain them only, and only maybe, in the well suppressed event of a legal contest. In *Astra*, it took EEOC pressure through appeal to secure an injunction requiring that settling employees be informed that they could talk to the EEOC. Even so, the decision was reduced to a

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[17] *Cariveau v. Halferty,* 83 Cal.App.4th 128, 137 (2000) (explicit regulatory bar "an instance of misconduct in itself"). *Wise v. Thrifty Payless, Inc.* 83 Cal.App.4th 1296, 1303 (2000) ("absolute privilege exists to protect citizens from the threat of litigation for communications to government agencies whose function it is to investigate and remedy wrongdoing").

[18] Until it discovered the secret settlements, the EEOC found Astra's low employee contact rate "sinister." *Astra,* 742. The paucity of secret settlement case law likewise belies such a pervasive success, that the state trial court was recently overwhelmed "Court administrators...closed access [to case files]. Turrone, the P.J., said balancing access and confidentiality issues can be challenging." *The Recorder,* Sept. 19, 2001 (underlying noticeable facts).

narrow dictum, by the employer's minimal appellate concession.[19]

To conform with paramount public policy, and so, for court approval, it is plain that confidential settlements ordinarily require a Miranda-like recitation of the inviolate right to communicate matters of reasonably possible concern to federal regulators, lest that right be lost to, or rather, taken from, us all.

G. [Reproduced Reply] Johnson Replies To Appellees' Pointed Silences Re The Confidentiality Term, And Re His Preferred Published Remedy.

[Above], Johnson showed that the record, including the state court's dispositive ruling that the word "all" *per se* restrained everything federal, manifested adhesive/sweetheart settlement practices that "functionally immunize prevalent abuse," and necessitate a Miranda-like rule requiring that, to conform with overriding federal public policy, confidentiality agreements must explicitly exclude federal regulatory communications. Appellant Johnson's Oral Hearing Statement, With Declaration Re Changed Circumstances Preferring In Part Published Relief, filed March 31, 2003 [App.7, pp.52-53], gave notice that, in the only other litigation he has in any way been involved with since the 1980s, Johnson now coincidentally confronts essentially the

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19 "We need not probe...more deeply, because *Astra* now interprets the confidentiality language as inapplicable to communications between settling employees and the EEOC relevant to an ongoing investigation." Id. 745 n. 6.

same dispute, wherefore he prefers the remedy of such a published Miranda-like rule. This point replies to appellees' total silence on this primary issue.

Johnson recognizes that a record on which an undecided and far reaching point of law is addressed by one party only, would ordinarily be so undeveloped as to render imprudent a published opinion. However, this consideration cannot be of such force as to reward the very evasion that might otherwise be outlawed. This court could take up the university's express offer to submit an even tardier brief on the issues it chose to ignore [citation]. Such a prestigious institution could surely provide the very best opposing argument, if and as required. On the other hand, there is herein exceptional cause to proceed to publication, on the unbalanced record. For Johnson has already shown how opposing interests have hitherto contrived to avoid a ruling on just such a basic question of law, by tactics including minimal retreats (reinterpretations) on appeal ([record]; citing *EEOC v. Astra USA, Inc.* 94 F.3d 738 (1st Cir. 1996)).

Moreover, it is a matter of common knowledge (a near-routine "60-minutes" sidebar) that grave public damage of every sort rolls on unseen, owing to the cost-effectiveness of confidential settlements whose broad terms adhesively impose on injured lay settlors beliefs and fears sufficient to squelch even life-saving regulatory messages. And it is a matter of mere common sense that *only* the express, disambiguating exclusion of regulatory communications, can effectively prevent such illegitimate abuse.

And this undoubtedly common abuse *is* illegitimate, is it not?

Of course, where such a new point of law is argued only by a lay litigant, the opposition's disregard for it would more likely reflect an incompetent presentation. But the presentation herein is sound and current. Moreover, the key justification for the published rule is to preclude the routine imposition of the attacked confidentiality presumption *on lay parties*.[20] Given this, the [below] disregard for Johnson's legal contentions logically *completes* the record as to the need to protect lay settlors by a published Miranda-like rule.

H. The Record Showing Judicial Prejudice.

In every proceeding, Johnson argued jurisdiction under *Ex Parte Young* and *Matsushita*. In no proceeding were either of these authorities anywhere addressed, by either court, or by either respondent.

The section "Legal Background" stated:

> The pleading of a *pro se* litigant is held to a less stringent standard than a pleading drafted by an attorney, and is to be afforded the benefit of any doubt. [Citations.]

The sections entitled "Background" and "Discussion" begin, respectively, as follows (App.1, 32, 34, 35; emphasis added):

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[20] *Sweetheart* deals are naturally less corrigible.

In this action, Plaintiff [] asserts that *unspecified* civil rights were violated by the [state] Court's approval of a negotiated confidential settlement.

It is *impossible* to discern from the face of the amended complaint the nature of his § 1983 claim.

The three and a half page First Amended Complaint For Declaratory Relief, to which the court refers, alleged:

10. Plaintiff's Invaded Federal Rights. Because it affirms a judgment that threatens substantial penalties should he so act, Defendant's April 20, 2001 order invades plaintiff's rights under the FCA and the First Amendment to the United States constitution: (i) to file claims under the FCA; and (ii) to tell the government the settlement terms, including the sum that the university agreed to pay for his promise not to file known prospective claims under the FCA....

[P]laintiff prays that this court [d]eclare that defendant's April 20, 2001 order is void [] as against public policy, because: (i) it did and does operate to deter the filing of prospective bounty hunter and whistleblower claims under the FCA, without the federal government having been informed; and (ii) it did and does operate to deter the reporting of information reasonably of possible interest to federal regulators.

Johnson's new trial memorandum, and his argument on appeal, began with the point: "The Court So Mistook The Complaint It Dismissed, As To Compellingly Prejudice The Deterred FCA Claims." He made this point by presenting the above quotations, and then informing the courts as follows:

> The complaint is short and seems straightforward, so the court's above assessment of it compels the conclusion that it would be beyond the bounds of reason for plaintiff to risk the substantial settlement sum, now retained by the university, by bringing a complex FCA suit before this court.

The petition for rehearing began as follows:

> In summarily affirming dismissal under its new Eleventh Amendment authority, *Simmons*, this court overlooks the fundamental fact that the § 1983 Complaint For Declaratory Relief is for declaratory- relief, and so not barred by the Eleventh Amendment, under *Ex Parte Young,* 209 U.S. 123 (1908). Consequently, the decision overlooks all else...
>
> Johnson of course argued that he seeks only declaratory relief, with no present or future threat to the state treasury; that such § 1983 suits against state officials are allowed under *Ex Parte Young*; and that any exception to this rule requires an articulation not given below..."The court's [necessarily implied] *Ex Parte Young* exception lacks required articulation. See

> *Verizon Md. Inc. v. Public Serv. Comm'n of MD.*, 122 S.Ct. 1753, 1760-1761 (2002)." [Opening Brief citation.]

The rehearing petition's second point was: "The Proceeding Raises Exceptionally Important Questions About Confidential Settlements That Frustrate Regulatory Statutes."

The petition quoted the terse Eleventh Amendment dismissal that cited *Simmons*, noting that "Nowhere before in this litigation has *Simmons* been cited." It continued:

> So settled is the regular availability, under § 1983, of declaratory relief against state officials, that this point may be intelligently skipped. This circuit's *published* opinions, re § 1983 suits to declare state appellate orders void, do not trouble to mention the Eleventh Amendment. *Bianchi v. Rylaarsdam*, 00-55585 (9th Cir. June 27, 2003) comprises two such concurring opinions.

The rehearing petition then showed that *Simmons* was just another suit for *damages*, and that it relied on *Greater L.A. Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1110 (9th Cir. 1987), which actually *upheld* a suit for declaratory relief, as follows: "Because the state treasury is not in jeopardy, the action against [state officials] is not barred by the Eleventh Amendment."

The rehearing petition concluded as follows:

Also unmentioned in this court's decision is the taken-as-true fact that the sought for declaration of rights could result in the department of defense recovering millions of falsely claimed dollars from the university, a private institution, through presently prevented and deterred, exclusively federal suits. In light of the common knowledge that this nation's soldiers now daily risk death in a hot and far land, often in defense of comparable assets, the panel's unpublished, one sentence, docket clearing Eleventh Amendment mantra, which fails to take note of a fact so basic that the caption "Complaint For Declaratory Relief" fully states it, appears to be an unpatriotic act of judicial convenience.

What motivated the panel's sua sponte introduction of *Simmons* as its sole Eleventh Amendment authority? Was it the obscurity of its distinguishing prayer for damages, attributable to its focus on prisoners' diminished rights? Was it the appellant's pro se status, a circumstance so infrequent in published opinions, as to give rise to the appearance, if not the message, that Johnson's pro se status was the real reason for affirming dismissal? A distinguishing fact is that the pro se appellant in *Simmons* was a dangerous career criminal, incarcerated for 175 years.

With the same profoundly qualified respect, Johnson echoes the dissent of Hon. Justice Kozinski as to the "integrity of the judicial process," where an incredible reason is affirmed for imposing some disposition upon a competent pro se litigant: "we diminish ourselves by acquiescing in what we know is not true." *U.S. v. Kaczynski*, 262 F.3d 1034, 1034-1036 (9th Cir. 2001). Such avoidance may have been tolerated so as not to reward the confessed terrorist Kaczynski with the last and largest of the soap boxes for which he had serially killed; but it is surely unconscionable where, as herein, the pro se specimen is a prospective public interest litigant, whose credentials even include a related and substantial settlement.

The avoidance of any appearance of impropriety has long been a canon of judicial conduct. Not only because the doctrine of *stare decisis* plainly so requires, but also to quash the appearance of convenient judicial retreat in a time of national crisis, this court should at least amend its decision so as to articulate the necessarily implied exception to *Ex Parte Young*.

Moreover, the exceptional import of the squelched confidential settlement questions magnifies both the public stake and the appearance of inappropriate judicial avoidance. In this increasingly vulnerable and most

> litigious society, wherein the great majority of civil suits settle without trial, is it not parlous and shameful that the illegitimacy remains unannounced, of pervasive settlement language that effectively suppresses regulatory communications, in the wake of actual and attributed damages and dangers of every sort?

None of the justices of the court of appeals voted for a rehearing. App.4, p.42-43. The pro forma denial could not have concluded with more, or more unnecessary, emphasis:

> No further filings will be accepted in this closed appeal.

IV. THE WRIT SHOULD ISSUE TO SETTLE WHETHER FEDERAL LAW TOLERATES CONFIDENTIALITY TERMS THAT FAIL TO EXPLICITLY EXCEPT ALL AND ANY REASONABLE REGULATORY SPEECH.

A. The Facts Are Undisputed Matters Of Record And, Under *Matsushita,* Both The Miranda Question And The Merits Are Reached.

The facts are matters of record in the state court, and the district court took "judicial notice of the transcripts of the Santa Clara Superior Court proceedings and of other court records relevant to this action."[21] All state court findings of

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[21] App.1, p.33 n.2. The university had so moved, introducing the bulk of the state court record.

fact are accepted. There is no dispute as to any material fact. *All* issues are matters of law, and so *all* jurisdictional issues must be resolved, on de novo review.

Matsushita set the peculiar standard for deciding jurisdiction over state court orders enforcing private agreements that impede the initiation of exclusively federal claims. To overcome the full faith and credit act, there must be an irreconcilable conflict with Congress' purposes in creating the exclusively federal action. In *Matsushita*, the standard was not met because the action was created to benefit the plaintiff. Where the action is brought in part on behalf of the government, and more so where brought *by* the government, the shoe is surely on the federal foot.

The irreconcilable conflict standard is implicitly met *whenever* regulatory speech is impeded, owing to inevitable or presumptive impairments of exclusively federal regulatory actions,[22] herein exemplified by *two* exclusively federal jurisdictions, under EEOC and FCA statutes. See pp.12-13. To regulate requires the power to sue. Limiting the capacity of regulators to receive and obtain information against the will of the corporations they regulate, renders them as powerful as a river running in a drought.

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22 28 U.S.C. § 1355 mandates *exclusive* federal jurisdiction over "any action or proceeding for the recovery or enforcement any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any act of Congress."

Both *Matsushita's* standard and the declaratory relief sought rest on showing an overriding congressional purpose in enacting the exclusively federal jurisdictions: Plaintiff's actual injury is their frustration. Wherefore, the merits are reached on review, without recourse to the discredited doctrine of "hypothetical jurisdiction." *See Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 88-93 (1998).

B. The Record Shows A Pervasive And Oppressive Situational Exploitation That Gravely Impairs Government Functions And Public Freedoms, Which The State Court Of Last Resort Upheld, And Which The United States Court Of Appeals Aggravated.

In his dreams, Johnson would prefer an elaborate affirmance of the Miranda question, presumably premised on *Matsushita*, that would apply a fortiori to the waiver term. Of course, there are subsumed and sub-subsumed questions. See 1, 12. But the record is rich enough to settle the overarching issue.

If the Miranda question has *any* merit, then resolving it is unquestionably a matter of highest national priority. To affirm it would inject a standard phrase into confidentiality clauses, perhaps into the vernacular. It implicates the vigor of every arm of government, even the national security, putting at issue the government's rights to know and to sue, entangling the Guaranty and Supremacy clauses, and the First Amendment's provisions re freedom of speech, freedom of the press, and the right to petition. If the record sustains the question, it surely should be certified.

Miranda questions are certfiable on a convincing showing that the adhesive exploitation of some specific situational innocence is widespread, and substantially impairs a mainstay of the constitution. *Miranda v. Arizona*, 384 U.S. 436 (1966). That high standard is met herein.

The record contains numerous extrinsic references establishing the pervasiveness of the oppressive imposition of overbroad confidentiality and waiver agreements, including: the protective order that Johnson found himself concurrently contesting (p.52); the fought-over injunction in *Astra*, requiring post-facto letters explicitly excepting regulatory speech (p.14); the fair settlement practices in employment statute, requiring the explicit waiver of the protected action (p.13, 54); the state bill that failed, even after narrowing them to condemn only confidentiality terms re products that had caused a loss of life or limb (p.17 n.16).

Herein, the state court of last resort "tailored" federal regulatory communications, barring voluntary telling of how much money Johnson was paid for his promise not to file multimillion dollar federal claims, by virtue of the word "all," which it boldfaced and italicized. Next, the district court, and a unanimous court of appeals, found no overriding federal interest, ruling with no more intelligence than it takes to click on "Ninth Circuit" and "GO," after typing "eleventh amendment" and "pro se" and "dismissed" and "affirmed."

Does *Ex Parte Young* not apply to pro pers? Does a bubble of provincial pride outweigh an outcast? But that is a separate question on which to grant certiorari, or summarily

remand, for failure to articulate the necessarily implied *Ex Parte Young* exception. Hints are not enough, and too much.

This failure to address *Ex Parte Young* tends to show that the oppressive imposition of least inconvenient legal conclusions on injured and belittled lay settlors, runs as a tide chasing him to the very door of this last court of last resort. *Can* this court refuse entry to both?

V. CONCLUSION

For the foregoing reasons, Petitioner prays that this court issue a writ of certiorari. For the court's information, he is assured of fully qualified representation, in the event of a proceeding on the merits.

Respectfully submitted,

_____ Date _____

Clifford Johnson, Petitioner pro se.

APPENDIX 1: ORDER DISMISSING ACTION AND JUDGMENT, ENTERED AUGUST 28, 2002

UNITED STATES DISTRICT COURT, FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CLIFFORD JOHNSON, Plaintiff

v.

CALIFORNIA COURT OF APPEAL, SIXTH APPELLATE DISTRICT; et al., Defendants.

Case Number C-02-1841-JF

ORDER GRANTING MOTIONS TO DISMISS WITHOUT LEAVE TO AMEND AND DISMISSING ACTION

On August 26, 2002, the Court heard oral argument regarding Defendants' motions to dismiss. The Court has considered the briefing and evidence submitted by the parties as well as the arguments of Plaintiff *pro se* and defense counsel presented at the hearing. For the reasons set forth below, the motions to dismiss will be granted without leave to amend and the action will be dismissed.

I. BACKGROUND

In this action, Plaintiff Clifford Johnson ("Mr. Johnson") asserts that unspecified civil rights were violated by the Santa Clara Superior Court's approval of a negotiated

confidential settlement agreement that disposed of Mr. Johnson's prior lawsuit against his former employer, Stanford University. At the suggestion of the Honorable Richard Turrone, who presided over the court-supervised settlement conference that resulted in the settlement agreement, the patties put the terms of the settlement on the record.[23] In that agreement, Mr. Johnson agreed to release any and all claims, whether asserted or unasserted, known or unknown, against Stanford. Judge Turrone questioned Mr. Johnson on the record regarding his understanding of the settlement terms, and Mr. Johnson stated that he understood and accepted the terms. Mr. Johnson subsequently attempted to withdraw from the settlement. The Superior Court confirmed the settlement over Mr. Johnson's objections. Judgment was entered on the terms of the recorded settlement. Mr. Johnson's motion for a new trial was denied.

Mr. Johnson appealed to the Sixth Appellate District, which affirmed the judgment of the Superior Court. The appellate court found that the record clearly indicated that Mr. Johnson understood the terms of the settlement agreement and gave his unambiguous consent to that agreement and its provisions. Mr. Johnson unsuccessfully sought rehearing by the Sixth Appellate District, then unsuccessfully sought review by the California Supreme Court. He then filed a petition for writ of certiorari in the United States Supreme Court. That petition was denied.

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[23] This Court takes judicial notice of the transcripts of the Santa Clara Superior Court proceedings and of other court records relevant to this action.

Mr. Johnson, proceeding *pro se*, filed the instant action on April 16, 2002 and filed the operative amended complaint on May 16, 2002. His amended complaint is somewhat difficult to decipher. He appears to be suing the Sixth Appellate District ("Sixth District") and The Board of Trustees of Leland Stanford University ("the Stanford Board") under 42 U.S.C. § 1983 for unspecified civil rights violations arising out of the Superior Court's judgment and the Sixth District's ruling on appeal. The Sixth District and the Stanford Board have filed separate motions to dismiss the amended complaint.

II. LEGAL STANDARD

"A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spaulding*, 467 U.S. 69,73 (1984); *see also Argabright v. United States*, 35 F.3d 472,474 (9th Cir. 1994).

For purposes of a motion to dismiss, the plaintiffs allegations are taken as true, and the Court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411,421 (1969); *Argabright* at 474. The pleading of a *pro se* litigant is held to a less stringent standard than a pleading drafted by an attorney, and is to be afforded the benefit of any doubt. *Haines v. Kerner*, 404 U.S. 519,520 (1972); *Karim-Panahi v. Los Angeles Police Department*, 839 F.2d 621,623 (9th Cir. 1988). Further, a *pro se* litigant must be given leave to amend unless it is absolutely clear that the deficiencies of the complaint could

not be cured by amendment. *Lucas v. Department of Corrections*, 66 F.3d 245, 248 (9th Cir. 1995).

III. DISCUSSION

Even applying these liberal standards, it is clear that Mr. Johnson's amended complaint must be dismissed. It is impossible to discern from the face of the amended complaint the nature of his § 1983 claims. However, any § 1983 claims would appear to be barred against the Sixth District under the Eleventh Amendment. *Durning v. Citibank, H.A.*, 950 F.2d 1419, 1422-23 (9th Cir. 1991) (stating that the Eleventh Amendment bars "federal courts from deciding virtually any case in which a state or the 'arm of a state' is a defendant - even where jurisdiction is predicated upon a federal question - unless the state has affirmatively consented to suit").

Moreover, it appears that Mr. Johnson is attempting to challenge in this Court rulings issued by the Sixth District and other state courts. It is well-settled that federal district courts do not have jurisdiction to review state court rulings. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923); *Dubinka v. Judges of the Superior Court*, 23 F.3d 218, 221 (9th Cir. 1994). Nor may a federal court plaintiff avoid the *Rooker-Feldman* bar by styling an attack on a state court ruling as a civil rights action. *Branson v. Hott*, 62 F.3d 287, 291 (9th Cir. 1995); *Worldwide Church of God v. McNair*, 805 F.2d 888, 893 n. 4 (9th Cir. 1986). Accordingly, as the Court reads Mr. Johnson's amended complaint, this Court is without jurisdiction to grant him the type of relief he seeks.

Mr. Johnson's claims against the Stanford Board are equally flawed. To make out a cause of action under § 1983, the plaintiff must allege: (1) the defendant acted under color of state law; and (2) deprived the plaintiff of rights secured by the United States Constitution or federal statutes. *Ortez v. Washington County*, 88 F.3d 804, 810 (1996). Mr. Johnson has not explained how the Stanford Board, a private entity, acted under color of state law in harming him. The *Rooker-Feldman* bar to this Court's review of state court rulings, discussed above, appears to bar Mr. Johnson's claims against the Stanford Board as well.

At the hearing, it became clear that Mr. Johnson's real concern is whether the underlying settlement bars potential claims that he might bring under the federal False Claims Act ("FCA"). He believes that such claims. were not, and could not have been, waived by the underlying settlement agreement, but would like a declaratory statement by this Court to that effect. The Court indicated its uncertainty regarding its authority to issue the type of advisory opinion requested, and stated that, in any event, such request could not be presented by means of a § 1983 action.

The Court indicated that it would dismiss the current § 1983 action without prejudice to the filing of a future action regarding FCA claims. The Court makes no comment as to the viability of any such future action.

IV. ORDER

The motions to dismiss the amended complaint are GRANTED WITHOUT LEAVE TO AMEND. Mr. Johnson's § 1983 action is DISMISSED WITHOUT PREJUDICE to the filing of a future action containing FCA claims.

DATED: 8/26/02

JEREMY FOGEL, United States District Judge.

JUDGMENT

Defendants' motions to dismiss having been granted:

IT IS ORDERED AND ADJUDGED that Plaintiff's complaint be dismissed without leave to amend and that the action be dismissed without prejudice to the filing of a future action based upon the federal False Claims Act.

DATED: 8/26/02

JEREMY FOGEL, United States District Judge.

APPENDIX 2: ORDER DENYING NEW TRIAL, FILED SEPTEMBER 27, 2002

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

CLIFFORD JOHNSON, Plaintiff

v.

CALIFORNIA COURT OF APPEAL, SIXTH APPELLATE DISTRICT; et al., Defendants.

Case Number C-02-1841-JF

ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL OR TO "COMPLETE THE JUDGMENT"

On August 27, 2002, the Court issued an order dismissing the instant action, which was brought under 42 U.S.C. § 1983, without prejudice to the filing of an action under the False Claims Act ("FCA"). The Court issued a judgment of dismissal on the same date. On September 9, 2002, Plaintiff filed a motion for a new trial or, in the alternative, to "complete the judgment." Plaintiff asserts that the Court erred in stating that he asserted violations of "unspecified" civil rights when his amended complaint clearly alleged, among other things, violations of free speech rights under the First Amendment. Plaintiff requests that the Court address these violations. Plaintiff further asserts that

the Court erred in stating that it could not issue a declaratory judgment regarding Plaintiff's right to pursue an FCA claim, citing authorities for the proposition that a court may issue declaratory judgments in § 1983 actions.

Although the Court did not address Plaintiff's alleged free speech violations specifically, the Court did make clear that any § 1983 claims against the Sixth District appear to be barred under the Eleventh Amendment. The Court further stated that any § 1983 claims against the Stanford Board appeared to be barred because the Stanford Board is a private entity and thus would not meet the "under color of state law" requirement of a § 1983 action. The Court therefore concluded that Plaintiff's § 1983 action - including any claim for declaratory relief asserted therein - was subject to dismissal without leave to amend. Nothing in Plaintiff's motion persuades the Court that it erred in these rulings. Accordingly, the motion for new trial or to complete the judgment is DENIED.

IT IS SO ORDERED.

DATED: 9/23/02

JEREMY FOGEL, United States District Judge.

APPENDIX 3: MEMORANDUM AFFIRMING DISMISSAL, FILED JUNE 19, 2003

NOT FOR PUBLICATION[24]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No.: 02-17122
D.C. No. CV-02-01841-JF

CLIFFORD J. JOHNSON,
Plaintiff-Appellant
v.
CALIFORNIA COURT OF APPEAL, SIXTH APPELLATE DISTRICT; et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California
Jeremy Fogel, District Judge, Presiding

Submitted June 9, 2003[25]
Before: BROWNING, THOMAS, and SILVERMAN

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24 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

25 The panel unanimously finds this case suitable for decision without oral argument and denies Appellant's request for oral hearing. *See* Fed. R. App. P. 34(a)(2). [Johnson's oral hearing statement *waived* an oral hearing.]]

Clifford J. Johnson appeals pro se the district court's judgment dismissing his 42 U.S.C. § 1983 action seeking to invalidate a settlement agreement he entered into with Stanford University in a prior state court action. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001) (failure to state a claim); *Yakama Indian Nation v. Wash. Dep't of Revenue*, 176 F.3d 1241, 1245 (9th Cir. 1999) (Eleventh Amendment immunity), and we affirm.

The district court properly dismissed Johnson's claims against the Stanford University Board of Trustees, because his allegations did not establish any "substantial cooperation or inextricably intertwined activity" between the Board and any state officials sufficient to subject Stanford to section 1983 liability. *See Brunette v. Humane Soc'y of Ventura County*, 294 F.3d 1205, 1209 (9th Cir. 2002).

The district court properly dismissed Johnson's claim against the California Court of Appeal as precluded by the Eleventh Amendment. *See Simmons v. Sacramento County Superior Court*, 318 F.3d 1156, 1161 (9th Cir. 2003).

The district court did not abuse its discretion in denying Johnson's Fed. R. Civ. P. 59 motion, because Johnson did not offer newly discovered evidence, demonstrate clear error or manifest injustice, or present an intervening change in controlling law. *See Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001).

We are unpersuaded by Johnson's remaining contentions. **AFFIRMED.**

APPENDIX 4: ORDER DENYING REHEARING, FILED AUGUST 21, 2003

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No.: 02-17122
D.C. No. CV-02-01841-JF

CLIFFORD J. JOHNSON,
Plaintiff-Appellant
v.
CALIFORNIA COURT OF APPEAL, SIXTH APPELLATE DISTRICT; et al.,
Defendants-Appellees.

Before: BROWNING, THOMAS, and SILVERMAN, Circuit Judges.

ORDER

The panel has voted to deny appellant's petition for panel rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

No further filings will be accepted in this closed appeal.

APPENDIX 5: STATE COURT ORDER, FILED APRIL 20, 2001 [EXCERPT]

[FOREWORD: This excerpts the only two contested parts of the appellate decision. The decision is provided in full as Appendix 4, pp.37-54, in the petition in case 01-625. The first part affirms a concomitant sealing order, finding no interest that could have warranted a public hearing, in part based on the order being "narrowly tailored" to the settlement terms. The second part states the grounds on which the judgment is affirmed as not against public policy.]

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT

HO20137
Santa Clara County Superior Court No.742286

CLIFFORD JOHNSON, Plaintiff and Appellant,
v.
STANFORD UNIVERSITY, et al., Defendants and Respondents.

...Plaintiff concedes that the parties' contractual nondisclosure obligations were an overriding interest. This interest obviously would have been prejudiced by disclosure. Sealing the terms of the settlement was clearly the least restrictive means available to ensure the confidentiality of the settlement terms, and the sealing was narrowly tailored so as to seal only the terms of the settlement. There is no indication

anywhere in the record before us that anyone other than plaintiff ever expressed any interest in these proceedings and would have opposed sealing if only a noticed hearing had been provided. A noticed hearing and express findings would have produced the same sealing orders.

...One term was that plaintiff waived ***all*** claims against defendants. As the court noted, if a claim was not waivable, this settlement term would not result in waiver of that claim. Plaintiffs subjective understanding of whether or not he had given up his federal claims was irrelevant because he had outwardly manifested an intent to waive all claims...Plaintiff maintains that the judgment was invalid even if he validly agreed to its terms because he was entitled to subsequently rescind it "for illegality of consideration, and as against the public interest." The only "illegality" he mentions is his allegation that the judgment impaired his First Amendment right to freedom of speech and his alleged right to bring a federal action. First Amendment rights may be waived if the relinquishment is clear, knowing and compelling. (*Fallout v. Hampshire* (1999) 74 Cal.App.4th 1394, 1400; *City of Glendale v. George* (1989) 208 Cal.App.3d 1394, 1398.) ... No "illegality" was involved in plaintiff's knowing and voluntary agreement to the nondisclosure obligation contained in the settlement. Plaintiff fails to define any "public interest" which would be abrogated by his agreement to the nondisclosure term of the settlement. Similarly, plaintiff's waiver of his federal claims was not illegal nor against the public interest.

Mihara, J.

WE CONCUR: Premo, Acting P.J. Elia, J.

APPENDIX 6: THE SECOND AMENDED COMPLAINT FOR DECLARATORY RELIEF

1. Plaintiff. Plaintiff Clifford Johnson resides at ...

2. Defendant State Court. Defendant California Court of Appeal, Sixth Appellate District ... is sued on account of the below-alleged conduct of the Hon. Mihara, Premo, and Elia, acting in their official capacities as justices of that court.

3. Defendant Stanford University. The Board of Trustees of Leland Stanford Junior University ("university") acts as a private corporation, under Cal. Ed. Code § 94000. The university is the real defendant in interest. ...

4. Intradistrict Assignment. ...

5. Jurisdiction. Pursuant to the jurisdictional grants of 28 U.S.C. § 1343(a) (3), (4), this action is brought under 42 U.S.C. § 1983, as it applies to states through the Fourteenth Amendment, to remedy the continuing invasion of plaintiff's federal rights by the below-alleged judicial order, issued effective April 20, 2001.

6. Facts: The Confidentiality and FCA Waiver Terms. In 1994, plaintiff filed suit against the university in the California Superior Court for the county of Santa Clara (No. CV 742286), alleging tort and contract claims arising from the termination of his employment by the university. On April 20, 1999, the trial court entered a "Confidential Judgment," under the authority of the Hon. Turrone, Judge, to enforce a purported settlement of the action, reached on December 10, 1998, without the government's knowledge or

consent, under which, for a sum of money, plaintiff agreed, inter alia, to the following two terms:

(a) Confidentiality Term. Plaintiff would not tell anyone, including the government, how much money the university agreed to pay him, or the form and manner of an agreed expression of regret, "unless compelled by legal process to do so," else he would forfeit a likewise confidential substantial sum of money.

(b) FCA Waiver Term. Plaintiff would not file any related "bounty hunter" or "whistleblower" claims under the False Claims Act (FCA), 31 U.S.C. § 3730 (a) and (h), including prospective claims of both sorts that he had particularly threatened to file.

7. Facts: The Prevented/Deterred Claims.

(a) *Confidentiality Term.* 31 U.S.C. § 3730 (b)(2) mandates that a bounty hunter suit commence with voluntary service on the government of "substantially all the material evidence and information the [relator] possesses." The settlement sum is, in plaintiff's reasonable opinion, an obviously and substantially material fact. Wherefore, said confidentiality term prevented and prevents plaintiff from filing a prospective bounty hunter action against the university, potentially to recover millions of federal government dollars.

(b) FCA Waiver Term. Under state law, post-settlement waiver breaches warrant loss of benefit and punitive awards. Wherefore, said FCA waiver term deterred and deters plaintiff from filing said bounty hunter and

whistleblower suits, both of which might inure to the government's benefit.

8. Facts: The April 20, 2001 Order. Having refused the settlement sum, plaintiff contested said terms in the trial court, and appealed them in the defendant court of appeal (No. H020137), arguing that the settlement was void ab initio, both on state law grounds, wherefore federal abstention doctrines required or favored exhaustion of state remedies, and on federal law grounds, which defendant court of appeal resolved by order filed April 20, 2001, under the authority of Hon. Justices Mihara, Premo, and Elia. Said order affirmed that state law governs the standards for deciding whether said confidentiality and FCA waiver terms were agreed, and that the evidence sufficed to sustain the finding that they were agreed. For the purposes of this suit, Plaintiff accepts this finding. Said order further held that:

(a) *The confidentiality term* is sufficiently "narrowly tailored so as to seal only the terms of the settlement."

(b) *The FCA waiver term* is not against public policy even though it literally includes the waiver of all of the suspended FCA claims, because, *if* to waive any of those claims is against federal public policy, which the court refused to decide, then those claims cannot be waived, and so are not waived, wherefore there is no violation of public policy.

9. Facts: Exhaustion Of State Remedies. Defendant court of appeal summarily denied a Petition for Rehearing by order filed May 15, 2001. The California supreme court denied a Petition For Review by order filed July 11, 2001. The United

States supreme court denied a petition for a writ of certiorari by order filed March 18, 2002 (No. 01-625).

10. Standing: Invaded Federal Rights. Because it affirms a judgment that, respectively through the confidentiality and FCA waiver terms, threatens substantial penalties should he so act, Defendant court of appeal's April 20, 2001 order invades plaintiff's rights, under the FCA and the First Amendment to the United States constitution:

(a) to tell the government the settlement terms, including the sum that the university agreed to pay for his promise not to file the threatened FCA claims; and

(b) to file bounty hunter and whistleblower claims under the FCA.

11. Jurisdiction: Full Faith And Credit Act Conformity.

[(a), (b) = reasons why the state's res judicata bar does not apply, abandoned on appeal.]

ELSE: (c) Under *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367 (1996), jurisdiction to enjoin the confidentiality term and FCA waiver terms is established by the alleged facts that they were agreed to without the government's knowledge or consent, and that each deters the initiation of bounty hunter claims under the FCA. Under *U.S. ex rel. Green v. Northrop Corp.*, 59 F.3d 953 (9th Cir.1995), such settlement terms are in irreconcilable conflict with the FCA, wherefore the *Matsushita* standard is met.

WHEREFORE, plaintiff prays that this court [d]eclare defendant court of appeal's April 20, 2001 order void ab initio as against public policy, because:

(i) *The confidentiality term* operates to deter the reporting of information of possible interest to federal regulators.

(ii) *The FCA waiver term* operates to deter the filing of prospective bounty hunter and whistleblower claims under the FCA, without the federal government having been informed.

APPENDIX 7: Johnson's Declaration Re Changed Circumstances, March, 2003

...Since the 1980s, I have been involved in absolutely no private or public grievance, claim, or litigation, other than the at bar litigation against Stanford University, and *Johnson v. Coldwell Banker*...I face expenses far beyond my means, to remedy building and health code violations not disclosed when I purchased (per a first-time house-buyer's mortgage) my present residence, in April, 1999...Exhibit A is the latest in a series of communications from Mendocino County officials, re "Building violation BC-2001-0015." It is a cover letter returning a first set of proposed re-engineering plans, listing deficiencies.

...Exhibit B below is a January 27, 2003 letter from the local franchisee's counsel, C. Kenneth James, Jr., which I did not read until after the printing of my opening brief in this appeal. It states:

> Please find enclosed the proposed Stipulated Protective Order that the [cc'd] attorneys for [national] Coldwell Banker are requiring both of us to sign before we are able to [comply with a discovery request]. Please sign where indicated and return to me promptly. We will then get the Stipulation filed with the court, and the order issued.

Exhibit C is the proposed Stipulated Protective Order. The court's approval is presumptively anticipated, on page 13. Although not a settlement agreement, the stipulation

contains confidentiality terms equivalent at law to the terms that I argue are against public policy in this federal appeal, in that: (a) the subject matter concerns facts of reasonably possible interest to federal regulators (re false advertising), and (2) the terms fail to explicitly exclude federal regulatory communications from the confidentiality restrictions. In particular: paragraph 6 at 3-4 lists eight exhaustive categories of persons excepted from confidentiality terms, none of which includes regulatory agents or agencies; paragraph 7 at 4-5 lists seven exhaustive categories of persons excepted from the confidentiality terms, none of which includes regulatory agents or agencies; and paragraph 2 at 2 limits the usage of information designated as confidential "solely" to the litigation of *Johnson v. Coldwell Banker*, broadly proscribing usage for a "governmental purpose or function."

I have refused to sign Exhibit C on the ground that it fails to exclude reasonable communications to regulatory agents or agencies from the confidentiality terms.

APPENDIX 8: AGE DISCRIMINATION IN EMPLOYMENT ACT

29 U.S.C. § 626(f)

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum —

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a

period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to —

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum —

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

APPENDIX 9: FALSE CLAIMS ACT

31 U.S.C. § 3729

(a) Liability for Certain Acts. — Any person who —

...(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person...

31 U.S.C. § 3730

(a) Responsibilities of the Attorney General. — The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for

at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

...(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

31 U.S.C. § 3731

...(b) A civil action under section 3730 may not be brought(1) more than 6 years after the date on which the violation of section 3729 is committed, or(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the

official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

APPENDIX 10: EQUAL OPPORTUNITY IN EMPLOYMENT ACT

42 U.S.C. § 2000e-6

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United Stat shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately

furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.